RE PICHI MUTHU

[R.Cr.J. (Sharma J.) March 14, 1970]

[Malacca — Criminal Revision No. 1 of 1970]

Criminal Law and Procedure — Trial — Power of High Court to set aside acquittal, in revision — Criminal Procedure Code, (Cap. 21), s. 322.

In this case the learned magistrate had acquitted the accused on a charge under section 4(b) of the Prevention of Corruption Act, 1961. Acting in revision the High Court set aside the order of acquittal and ordered a retrial.

Held: in appropriate cases the High Court does and should interfere to set aside the orders of acquittal solely with the object to order a retrial.

Case referred to:-

(1) *Chinnaswamy* v. *State of Andhra Pradesh* A.I.R. 1962 S.C. 1788, 1791, 1792.

CRIMINAL REVISION.

Sharma J. (delivering oral judgment): The accused was charged in the court of the president, sessions court, Malacca, under section 4(b) of the Prevention of Corruption Act, 1961 for having offered 35 cents cash to P.C. 12931, Haji Ibrahim bin Haji Hamzah, as an inducement for forbearing to take action against him under the Road Traffic Ordinance, 1958.

The accused was the driver of lorry BS 3661 and had parked it in the middle of the road. The lorry was unattended. A little later the accused appeared and on being questioned by P.W. 1 he offered him 35 cents with the remark "Jangan saman sama saya, Inche. Minum kopi dengan ini wang." The accused was thereupon arrested. The accused in his defence said that he was unloading fish at the time P.W. 1 came up, but no such suggestion was ever made during the cross-examination of either P.W. 1 or P.W. 2. The accused denied making any payment and said in his defence that the money was in fact not paid but had dropped from the book containing his driving licence. Again no such defence was put or suggested to any of the prosecution witnesses while they were under cross-examination. The learned president thought that the explanation given by the accused that the money had slipped out of the book containing the driving licence was reasonable in spite of the fact that not a word of it was suggested to either P.W. 1 or P.W. 2 and he therefore acquitted the accused. P.W. 1 in fact maintained that the accused when asked to produce his identity card and the driving licence did not produce the same to him. P.W. 1's testimony was corroborated by P.W. 2. The accused in his defence said that the cash dropped on the ground from his driving licence as he was in the process of taking it out but added "I asked for the coins back. P.W. 1 asked me whether I was giving something to him." How could the coins get into the hands of P.W. 1?

I had sent for the record in the exercise of my powers under revision. I am of the view that the learned president was wrong in acquitting the accused in these circumstances. I am quite cognizant of the provisions of section 322 of the Straits Settlements Criminal Procedure Code which provides that the High Court acting in revision cannot convert a finding of acquittal into one of conviction. An order of retrial after setting aside an acquittal in revision does not amount to conversion of a finding of acquittal into one of conviction. There can be no doubt about the jurisdiction of the High Court to interfere in revision either on the application of one of the parties or on its own motion. In appropriate cases the High Court does and should interfere to set aside the orders of acquittal solely with the object to order a retrial. (See *Chinnaswamy* v. *State of Andhra Pradesh*(1)). The learned president had misdirected himself in ignoring and overlooking the evidence of P.W. 1 and P.W. 2 and the total lack of any cross-examination of these witnesses touching the defence which was subsequently suggested for the first time only when the defence was called.

I agree that it is only in serious cases that such a power should be exercised by the High Court. The offence in this case was an offence under the Prevention of Corruption Act, a very serious offence which goes to deface the very image of any good administration and is a disgrace to the society which attempts to corrupt its own law enforcement officers. In the circumstances I set aside the order of the learned president and order a retrial.

The accused will appear before the president, sessions court on the 16th March, 1970. He is allowed bail in the sum of $50.

Retrial ordered.

ATTAN BIN ABDUL GANI v. PUBLIC PROSECUTOR

[A.Cr.J. (Sharma J.) March 14, 1970]

[Malacca — Criminal Appeal No. 23 of 1969]

Bribery and Corruption — Presumption from payment of gratification — Duty of accused to rebut presumption — Consent of Public Prosecutor — Corroboration — Prevention of Corruption Act, 1961, ss. 4(a) and 14.

Evidence — Corroboration — Law as to, summarised.

This was an appeal against the conviction of the appellant for an offence under section 4(a) of the Prevention of Corruption Act, 1961.

Held, dismissing the appeal: (1) as it was proved in this case that the gratification had been received by the appellant, the presumption under section 14 of the Prevention of Corruption Act, 1961 arose that the gratification was paid or given or received corruptly;

(2) in the circumstances the appellant had not rebutted the presumption and therefore the appeal must be dismissed.

Cases referred to:-

(1) *State of Madras* v. *Vaidyanatha Iyer* A.I.R. 1958 S.C. 61.

(2) *Emden* v. *State of Uttar Pradesh* A.I.R. 1960 S.C. 548.

(3) *R.* v. *Carr-Briant* [1943] K.B. 607.

(4) *Saminathan* v. *Public Prosecutor* [1955] M.L.J. 121.

(5) *Otto George Gfella* v. *The King* A.I.R. 1943 P.C. 211.

(6) *Lyn Hong Yap* v. *Public Prosecutor* [1956] M.L.J. 226.

(7) *Haji Mohamed Paiman* v. *Public Prosecutor* [1966] 1 M.L.J. 58.

(8) *Chua Beow Huat* v. *Public Prosecutor* [1970] 2 M.L.J. 29.

MAGISTRATE'S CRIMINAL APPEAL.

Edgar Joseph Jr. for the appellant.

Ahmad bin Abdul (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Sharma J.: The appellant was at the relevant time a sergeant in the Royal Malaysian Police. He was charged under section 4(a) of the Prevention of Corruption Act, 1961 for having on April 28, 1969 corruptly accepted a sum of $50 from one Latip bin Muslim as an inducement to prefer a less serious charge against him in relation to the user by him of his car MB 5640 under the Road Traffic Ordinance, 1958. The learned president found the appellant guilty and sentenced him to 3 months' imprisonment.

The evidence adduced by the prosecution briefly was that on April 14, 1969 the appellant stopped the car MB 5640 in Jasin town as it had previously remained under observation and as it was suspected that Latip bin Muslim (P.W. 1) was using it as a pirate taxi. The car having been stopped, P.W. 1 was taken to the police station where his car was detained and he was informed that he might be charged in court for operating a public service vehicle without a licence. P.W. 1 next saw the appellant on April 18, 1969 when he (P.W. 1) invited him to a coffee shop and requested him for his assistance so that instead of being charged for carrying passengers for hire and reward in his car which was not licensed for that purpose he could be charged for some lesser offence. The appellant told P.W. 1 that he could help but had first to discuss the matter with inspector Ismail (P.W. 4). The appellant denied that this meeting ever took place. It is, however, apparent that the appellant never brought up the matter with inspector Ismail and it is difficult to believe or imagine that he ever could. On April 26, 1969 and again on April 28, 1969 one Minhad (P.W. 2) went to see P.W. 1 in order to tell him that the appellant wished to meet him. The appellant denied that he ever met P.W. 2 on April 26, 1969 or April 28, 1969 or that he asked him to convey any message to P.W. 1. P.W. 2, however, supports P.W. 1's testimony on that point. P.W. 1 met the appellant in Jasin town on April 28, 1969 and invited him into coffee shop No. 65 Main Road, Jasin where he repeated his earlier plea for reduction of the charge to one of lesser gravity. The appellant agreed to help on payment of $50 "coffee money". The time and place of payment were agreed. It was to be that very evening at 8.00 p.m. at the same coffee shop. The appellant denies that this meeting ever took place or that he at any time made any such arrangement with P.W. 1. The question whether such a meeting did in fact take place or not is important to determine the veracity or truthfulness of P.W. 1's testimony because as it transpired the appellant did appear at the appointed place that evening and almost at the appointed hour to fall into the trap.

P.W. 1 says he felt it was an offence to pay $50 to the appellant. I am not inclined to believe that he felt that way. All he may actually have felt was to put the appellant in some trouble, if he could, for having stopped his "business". P.W. 1 saw Minhad and they came to Malacca in one Haji Arshad's car in order to report to the anti-corruption agency. The three of them went to the house of chief inspector Hashim (P.W. 6) where P.W. 1 made the report Exhibit P1. P.W. 6 then took them to the house of A.S.P. Jamil Hassan (P.W. 7) where inspector Tan Eng Cheng (P.W. 10) was called. P.W. 7 gave to P.W. 1 five currency notes of $10 denomination. The particulars of these currency notes were taken down (Exhibit P13). Instructions were given to P.W. 1 that after he had handed over the five $10 currency notes (P13 A-E) to the appellant he should in the act of leaving shop No. 65 Main Road, Jasin light a cigarette to serve as a signal to the raiding party which was to lie in hiding opposite the said shop. P.W. 2 was to remain with P.W. 1 to see and hear what transpired between the appellant and P.W. 1. The party consisting of P.W. 1, P.W. 2, P.W. 6, P.W. 7 and P.W. 10 then proceeded to Jasin. P.W. 1 waited inside the shop while P.W. 2 remained in the five foot way to await the arrival of the appellant. P.W. 6, P.W. 7 and P.W. 10 took their positions on the other side of the shop. At about 8.30 p.m. the appellant appeared and asked P.W. 2 where P.W. 1 was. The appellant and P.W. 2 went into the shop where P.W. 1 handed the five currency notes (P13 A-E) to the appellant. P.W. 1 got up, placed an order for drinks and gave the signal which he was instructed to give. He then found that the appellant and P.W. 2 had both left the shop. The appellant was seen walking hurriedly and fast along the five foot way towards Jalan Rim. P.W. 10 rushed up to chase the appellant who then began to run and turned into a lane between Shop No. 59 and Shop No. 60 Main Road, Jasin (see Plan Exhibit P14). P.W. 10 continued the chase but lost sight of the appellant. P.W. 7 rushed to the lane between Shop No. 69 and Shop No. 70 and met P.W. 10 in the lane behind Shop Nos. 60 to 69. The appellant had disappeared and so they came back to the Main Road where they found the appellant this time walking towards the police station. P.W. 7 arrested the appellant almost in front of Shop No. 69 and took him to the police station where the appellant was searched. The $10 currency notes were not found on his person. P.W. 7 then rang up the O.C.P.D. Jasin (P.W. 8) and on his arrival, which was almost immediate, P.W. 7, P.W. 8 and P.W. 10 proceeded to the lane behind Shop Nos. 55 to 76 (see Exhibit P14) and there in the drain at the back of Shop No. 58 they found the five $10 currency notes which P.W. 1 is said to have handed to the appellant.

The appellant's version of the incident in brief is that he was on anti-crime duty at about 8.15 p.m. on April 28, 1969 and on arrival at No. 64 Main Road, Jasin he found P.W. 1 in the five foot way. P.W. 1 was alone. At the insistence of P.W. 1 he went into Shop No. 64 where P.W. 1 asked him if he could reduce the charge against P.W. 1 to one which was lesser in gravity. The appellant expressed his inability, walked out of the shop and proceeded towards Jalan Rim. At Shop No. 66 he saw P.W. 2 standing in the dark. From there he proceeded towards the petrol kiosk and then

turned back towards the police station and it was only thus and in those circumstances that he was stopped and arrested by P.W. 7. In other words he never went into Shop No. 65, he never entered the lane between Shop No. 59 and Shop No. 60 and never went into the lane behind Shop Nos. 55 to 76. The defence in short was a total denial.

P.W. 5 Hamzah bin Murib, who is a shop assistant employed in Shop No. 65 Main Road, Jasin gave evidence to the effect that on April 28, 1969 the appellant was in Shop No. 65 together with P.W. 1 and P.W. 2 at about 8.30 p.m. It was not even suggested to P.W. 5 that the appellant never went to that shop. According to P.W. 7, A.S.P. Jamil bin Hassan, Shop No. 64 had its doors closed at the time they were waiting opposite Shop No. 65. It is not only P.W. 1 and P.W. 2 who say that the appellant went into Shop No. 65 but P.W. 6, P.W. 7 and P.W. 10 confirm it. The appellant could urge that P.W. 1 being an accomplice was not worthy of credit but he could not possibly level any charges of suspicion against P.W. 6, P.W. 7 and P.W. 10. P.W. 1 came out of Shop No. 65 and gave the agreed signal at about 8.52 p.m. The five currency notes (P13 A-E) were found in the drain behind Shop No. 58 at 9.25 p.m. (see the evidence of P.W. 7). I am asked that in those circumstances the learned president should have inferred that it was not the accused who threw those notes into the drain. P.W. 1 after giving the signal took the drink which he had ordered and went to Jalan Kesang where he met P.W. 2 and Haji Arshad. The three of them then left in Haji Arshad's car. There is no evidence of any communication or contact between P.W. 1 or P.W. 2 and P.W. 6, P.W. 7 or P.W. 10 on the night of April 28, 1969 after P.W. 1 had given the agreed signal. The five currency notes (P13 A-E) did move out of the hands of P.W. 1. Is it reasonable to suppose that in those circumstances they went into the hands of someone other than the appellant? The learned president found on the evidence adduced by the prosecution that the appellant had accepted $50 from P.W. 1 and to put it in his own words the learned president said "Thus at the end of the prosecution case I was fully satisfied that the accused had accepted the sum of $50 from P.W. 1." I think he could not have found otherwise.

The learned president having found as a fact the sum of $50 was received by the appellant from P.W. 1, the presumption under section 14 of the Prevention of Corruption Act, 1961 obviously arose in the case. The presumption is that the gratification as defined in the Act was received corruptly and as an inducement to charge P.W. 1 under a lesser charge. I may add that the words used in the English version of the charge against the appellant, *viz.* "...as an inducement for forbearing to do an act in relation to your principal's affairs, to *wit*, reducing the charges against the said Latip bin Muslim..." are not as intelligible as the Malay version of the charge. In any event the charge was fully understood by the appellant and everyone knew what it was. No objection was taken to the wording of the charge either at the trial or on the hearing of the appeal. Once it is proved that the gratification has been paid or received then in the words of section 14 of the Act "Such gratification *shall be deemed* to have been paid or given or received corruptly..." The presumption at once arises under the section. This presumption is a presumption of law and it is obligatory on the court to raise it in every proceeding for an offence under section 3 or 4 of the Act *provided* it is proved that the gratification had been paid, given or received. The prosecution has not to establish anything more than the payment of money (See *State of Madras* v. *Vaidyanatha Iyer* [1] and *Emden* v. *State of Uttar Pradesh*[2]). It then becomes the duty of the accused to disprove what section 14 begins to presume against him. For what is the degree of proof required of the accused see *Rex* v. *Carr-Briant*,[3] *Saminathan* v. *Public Prosecutor*[4] and *Otto George Gfella* v. *The King*[5]. The presumption cannot be said to have been rebutted without sufficient evidence, *i.e.* such evidence as is reasonably sufficient to invite belief in its probable truthfulness. It was very strongly urged that as the defence was one of non-receipt of the money there was no onus on the appellant to prove "the contrary" suggested in section 14. The argument is fallacious because the presumption comes into operation only when the *factum* of payment is proved as it was to the satisfaction of the learned president in this case. If payment is not proved the presumption does not arise and consequently there is nothing which the accused is required to prove to the contrary.

The learned president considered the defence of the appellant. I have given it careful thought and consideration and have asked myself whether it does raise any reasonable doubt in the prosecution case but the only answer I can find is "No." I have again asked myself "Could what the appellant says be reasonably true?" and again I am, on the examination of the evidence, unable to answer that question in the affirmative unless I totally brush aside the evidence not only of P.W. 1 and P.W. 2 but also of P.W. 6, P.W. 7, P.W. 8 and P.W. 10. The appellant says it is his habit to walk fast but he was seen running by P.W. 6, P.W. 7 and P.W. 10 who found him running in a direction different from what the appellant says he was walking towards. (Haji Arshad was made available but was not availed of by the defence. No adverse inference, however, can be drawn against the appellant on that account.)

Those being the facts and these being the findings I see no merit in the appeal. A number of points were raised and a number of authorities cited by the learned counsel for the appellant. In deference to the commendable effort, research and the very able arguments of the counsel it may not look proper on my part to allow some of the points raised to find dismissal in silence. I will very briefly deal with them.

The question of the consent of the Public Prosecutor is fully dealt with in the case of *Lyn Hong Yap* v. *Public Prosecutor*[6]. The decision of Thomson J. (as he then was) was approved and confirmed by the Court of Appeal. It appears from the report of *Haji Mohamed Paiman* v. *Public Prosecutor*[7] that the case of *Lyn Hong Yap* v. *Public Prosecutor*[6] was not brought to the notice of the court. I am bound by the decision in *Lyn Hong Yap's* case.

There was more than ample tangible corroboration to be found in this case. There is no magic in the use of the word "corroboration." The existence of corroboration is not dependent upon the use of that word. The main thing to look for is whether it exists. In some cases it may require some effort, examination and analysis of the evidence to find it, while in others, as in this case, it may appear undisguised and manifest on the face of the record itself. I have already in the case of *Chua Beow Huat* v. *Public Prosecutor*[8] held that the appellate court is at liberty to look for and find corroboration in the evidence even if the trial court had omitted to do so. The point has again been raised in this appeal and I need not repeat what I have already said in *Chua Beow Huat* v. *Public Prosecutor*. The position, perhaps, may be different in the case of a jury trial.

The law as to corroboration as enunciated by the various authorities may be summarised thus: —

"It would be impossible, indeed it would be dangerous, to formulate the kind of evidence which should, or would, be regarded as corroboration. Its nature and extent must necessarily vary with the circumstances of each case and also according to the particular circumstances of the offence charged. But to this extent the rules are clear:—

(1) It is not necessary that there should be independent confirmation of every material circumstance in the sense that the independent evidence in the case, apart from the testimony of the complainant or the accomplice, should in itself be sufficient to sustain conviction. All that is required is that there must be some additional evidence rendering it probable that the story of the accomplice (or complainant) is true and that it is reasonably safe to act upon it.

(2) The independent evidence must not only make it safe to believe that the crime was committed but must in some way reasonably connect or tend to connect the accused with it by confirming in some material particular the testimony of the accomplice or complainant that the accused committed the crime.

(3) The corroboration must come from independent sources and thus ordinarily the testimony of one accomplice would not be sufficient to corroborate that of another.

(4) The corroboration need not be direct evidence that the accused committed the crime. It is sufficient if it is merely circumstantial evidence of his connection with the crime.

(5) Corroboration must be in material particulars but it is not necessary that the whole prosecution story or all material particulars should be corroborated.

(6) Corroborative evidence required for accepting the testimony of an accomplice need not by itself conclusively establish the guilt of the accused. It is sufficient if it is a piece of circumstantial evidence which tends to connect the accused with the crime with which he is charged.

(7) Though a trap-witness is not an approver, he is certainly an interested witness in the sense that he is interested to see that the trap laid by him succeeded. He could at least be equated with a partisan witness and it would not be admissible to rely upon his evidence without corroboration. His evidence is not a tainted one; it would only make a difference in the degree of corroboration required rather than the necessity for it.

(8) Corroboration need not be by direct evidence. It may be by circumstantial evidence in which case the rule relating to proof from circumstantial evidence would apply and the circumstance must be consistent with the innocence of the accused against whom the circumstance is offered as evidence.

(9) There must be corroboration in one or more material particulars but that does not mean in every particular or detail. Corroboration, as the grammatical meaning of the word itself implies, means only support, or in other words, an assurance of truth which is lent to the evidence of the accomplice or the complainant by other evidence. It does not mean that the whole evidence given by the accomplice (or complainant) must be repeated wholly or in parts by witnesses other than the accomplice (or the complainant).

(10) The minimum corroboration which the law ordinarily requires of the evidence of an accomplice is evidence of at least one material fact pointing to the guilt of the accused person. The weight of such corroborative evidence which is necessary depends on the particular facts and circumstances of the case."

A part of the evidence of P.W. 3 no doubt suggests that the appellant did not meet P.W. 1 or P.W. 2 on April 16, 1969, April 18, 1969, April 26, 1969 or on the morning of April 28, 1969, but this evidence was hardly of any significance when the witness was confronted with entries in Exhibits P2 to P11. P.W. 3's testimony could not consequently be of any assistance to the appellant.

Another point of some interest raised was that the powers enjoyed by the Federal Court under section 60(1) of the Courts of Judicature Act are not exercisable by the High Court in its appellate jurisdiction. I think the simple answer to that lies in looking at the provisions of section 448 of the Straits Settlements Criminal Procedure Code (= section 422 F.M.S. Criminal Procedure Code). In my view, however, the question is only academic. The learned president had come to the right decision and considering the evidence which he had to consider he could not have come to any other decision.

It was again suggested that as P.W. 1 maintained that he had not committed the offence of conveying passengers for hire and reward without having a public service vehicle licence, there was no favour which the appellant could show to P.W. 1 and that as the alleged favour was not even within the competence of the government itself, section 6(1) of the Act had no application. The argument is attractive but without substance. An offence is defined as "any act or omission made punishable by law for the time being in force." The appeal record indicates that at the time P.W. 1 gave evidence in the present case he had not yet been formally charged in court for the suspected offence. The appellant had made the report Ex. P12 on April 16, 1969 and had told P.W. 1 that he would be charged in court. P.W. 1's car was detained at the police station. The mere fact that P.W. 1 did not want to admit at the trial of the appellant that he had committed an offence and at a time when the proposed charge had been deferred is not the same thing as saying that no charge could be brought against him and that there was no basis for the report which the appellant himself had made against P.W. 1.

The appeal is dismissed.

Appeal dismissed.

Solicitors: *Joseph & Son.*